United States
Environmental Protection
Agency

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EPA

April 6, 1993

Bob Stewart
U.S. Department of Energy
Richland Operations Office
P.O. Box 550, A5-19
Richland, Washington 99352

Re: NEPA Requirements for the 618-11 Expedited Response Action

Dear Mr. Stewart:

In reviewing the meeting minutes for the March 14, 1993 Expedited Response Action (ERA) weekly meeting, I noted that the U.S. Department of Energy's Richland Operations Office (DOE/RL) has been involved in discussions of the National Environmental Policy Act (NEPA) in connection with the 618-11 ERA. The Hanford Project Office of the U.S. Environmental Protection Agency (EPA) has repeatedly identified to DOE/RL that you should not apply the NEPA process to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) response actions.

Enclosed is an understandable legal discussion that may help you appreciate the legal foundation for dismissal of the NEPA process with the 618-11 ERA. Again, this discussion for the 618-11 ERA is a specific instance of the general message we have been sending DOE; that the express terms of both NEPA and CERCLA make clear that NEPA's procedures were not intended to apply where EPA is complying with the more specific standards and procedures articulated in CERCLA.

The EPA does not support the use of funds appropriated for cleanup activities in order to pursue procedural requirements of NEPA. I encourage you to read the enclosure to this letter in order to appreciate the extent of legal precedence behind the message of this letter. If you have any questions, please call me at (509) 376-9884.

Sincerely,

Larry Gadbois

Larry Gadbois
618-11 Unit Manager

Encl: Memorandum from Larry Starfield, EPA, dated Jan 5, 1993

cc: Bob McLeod, DOE
Steve Wisness, DOE
Roger Stanley, Ecology
Nancy Uziemblo, Ecology
Becky Austin, WHC
Chris Kramer, WHC
George Henckel, WHC
Wayne Johnson, WHC
Administrative Record, (618-11 Expedited Response Action)

UNITED STATES ~~ENVIRONMENTAL PROTECTION~~ AGENCY
WASHINGTON, D.C. 20460

JAN 6 1993
OFFICE OF REGIONAL COUNSEL
EPA - REGION X

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OFFICE OF
GENERAL COUNSEL

JAN 7 1993

MEMORANDUM

SUBJECT: ARARs Expert Group -- Updated Materials

FROM: Larry Starfield
Attorney
Solid Waste and Emergency
Response Division (LE-132S)

TO: Addressees

I am attaching, for your information, an excerpt from a brief we filed recently in Arkansas Peace Center v. Arkansas Dept. of Pollution Control and Ecology, U.S. EPA, et al., (E.D. Ark.) (the Vertac incinerator case). In that case, we briefly addressed the merits of whether NEPA requirements apply to CERCLA response actions (specifically, a removal action in that case).

This may be the first time the United States has clearly set out an analysis for the non-applicability of NEPA based on the ARARs provisions of CERCLA. YOU SHOULD ADD THIS EXCERPT TO YOUR ARARs NOTEBOOK AS THE LAST ENTRY IN TAB "R".

Attachment

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ARKANSAS PEACE CENTER; ENVIRONMENTAL HEALTH ASSOCIATION OF ARKANSAS; JACKSONVILLE MOTHERS' AND CHILDREN'S DEFENSE FUND; VIETNAM VETERANS OF AMERICA ARKANSAS STATE CHAPTER, and MOTHERS AIR WATCH, Plaintiffs, v. ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, RANDALL MATHIS, DIRECTOR; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, WILLIAM H. REILLY, ADMINISTRATOR, and VERTAC SITE CONTRACTORS, Defendants.	)	No. LR-C-92-684

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
DEFENDANT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

This memorandum is filed in support of the Motion to Dismiss of Defendant United States Environmental Protection Agency ("EPA") pursuant to Fed. R. Civ. P. 12(b)(6).

INTRODUCTION

This is the second action before this Court seeking to enjoin the incineration of dioxin-contaminated wastes at the Vertac Superfund Site ("Vertac Site") in Jacksonville, Arkansas. Like the previous action, National Toxics Campaign, et al. v. Arkansas Dep't of Pollution Control & Ecology, et al., No. LR-C-91-194, this case is purportedly brought under the citizen suit provisions of the Resource Conservation and Recovery Act ("RCRA"), section 7002, 42 U.S.C. § 6972, and the Comprehensive

provides that such a challenge to EPA regulations may be brought only in the "Circuit Court of Appeals of the United States for the District of Columbia Circuit," within ninety days after the date of promulgation of the regulations. 42 U.S.C. § 9613(a). Because the final version of the currently applicable NCP was published in March, 1990, the complaint here is both untimely and in the wrong court. Thus, even if section 113(h) did not bar plaintiffs' claim, section 113(a) of CERCLA deprives the Court of jurisdiction to hear their CERCLA challenges.

F. NEPA Does Not Apply To EPA Response Actions Taken Under CERCLA.

As explained above, because section 113(h) of CERCLA bars consideration of claims under NEPA at this time, as well as claims under any other statute, it is not necessary to consider the applicability of NEPA to EPA's CERCLA action. However, even if this action were not barred by section 113(h), it is clear that EPA is not required to prepare an EIS, as alleged in plaintiff's complaint (Complaint at ¶¶ 59, 63).

The Supreme Court has established generally "that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way." Flint Ridge Dev. Co. v. Scenic River Ass'n, 426 U.S. 776, 778 (1976). This standard, in part, gives effect to the Supreme Court's pronouncement that "NEPA was not intended to repeal by implication any other statute." SCRAP, 412 U.S. at 694. Here, the express terms of both NEPA and CERCLA make clear that NEPA's procedures were not intended to apply where EPA is

NPL as well as non NPL

complying with the more specific standards and procedures articulated in CERCLA.

First, section 104 of NEPA provides that "[n]othing in [NEPA Sections 102 or 103] shall in any way affect the specific statutory obligations of any Federal Agency (1) to comply with criteria or standards of environmental quality, [or] (2) to coordinate or consult with any other Federal or State agency, ..." 42 U.S.C. § 4334 (emphasis supplied). The clear intent of this language is that where actions are taken under other, later-enacted and more specific environmental statutes, the terms of those statutes should govern, and not NEPA.[40] This reading is also consistent with the traditional canon of construction that later-enacted and more specific statutes take precedence over

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[40] The legislative history of NEPA confirms this reading. Senator Henry Jackson, one of NEPA's principal sponsors, explained in a section-by-section analysis on behalf of NEPA's Senate conferees, explained the broad sweep of section 104 of NEPA as follows:

> There are existing statutes and there may in the future be new statutes which prescribe specific criteria or standards of quality for environmental indicators, or which prescribe certain procedures for coordination or consultation with state or Federal agencies, or which require recommendations or certification of other Federal agencies as a prerequisite to certain actions. It is not the intent of Sections 102 [the EIS requirement] or 103 of this Act to substitute less specific requirements for those which are established concerning particular actions or agencies. It is the intention that where there is no more effective procedure already established, the procedure of this act will be followed.

115 Cong. Rec. 40420 (Dec. 20, 1969)(remarks of Sen. Jackson) (emphasis added).

earlier, more general statutes dealing with the same subject matter. See Busic v. United States, 446 U.S. 398, 406 (1980).

Thus, as a number of courts have held, where the authorizing federal statute already provides for a detailed analysis of impacts on the environment, a separate and additional EIS under NEPA is not required. See State of Alabama v. EPA, 911 F.2d 499 (11th Cir. 1990) (RCRA); Merrell v. Thomas, 807 F.2d 776 (9th Cir. 1986) (Federal Insecticide, Rodenticide, and Fungicide Act (FIFRA), 7 U.S.C. §§ 136-136y); Western Nebraska Resources Council v. EPA, 943 F.2d 867, 871-72 (8th Cir. 1981) (Safe Drinking Water Act, §§ 300f-300j-26 (SDWA)); Pacific Legal Foundation v. Andrus, 657 F.2d 829 (6th Circuit 1981) (Endangered Species Act). CERCLA -- like RCRA, FIFRA, and the SDWA -- is far more specific than NEPA both in the substantive and procedural standards it imposes. Accordingly, both section 104 of NEPA and ordinary principles of statutory construction preclude NEPA application to comprehensive environmental statutes like CERCLA.

Second, sections 121(d)(2) and (d)(4) of CERCLA (42 U.S.C. § 9621(d)(2), 9621(d)(4)), set forth specific procedures for considering the requirements of other laws, and these procedures do not permit incorporation of an EIS requirement. As amended by SARA, CERCLA requires on-site remedies to attain "level[s] or standard[s] of control" established by the "applicable or relevant and appropriate requirements" (ARARs) of federal and state environmental laws (unless one of six limited waivers is found to be appropriate). 40 C.F.R. 300.415(i).

These cleanup standards, or ARARs, are defined in the NCP as substantive, as opposed to procedural requirements, see 40 C.F.R. § 300.5. [41] Because NEPA requirements are procedural in nature, not substantive, they are excluded from the CERCLA process.[42] This is consistent with the Congressional mandate for "prompt cleanup of hazardous waste sites," unsaddled by time-consuming procedural requirements. Dickerson, 834 F.2d 974 at 978; J.V. Peters & Co., 767 F.2d at 264.

Third, the application of NEPA would conflict with CERCLA removal actions. Most removal actions under CERCLA are taken to control or minimize hazardous releases in time-critical situations, where less than six months planning time is available. See 40 C.F.R. § 300.415(m). EPA's removal authority would be seriously undermined if the agency, as a pre-condition to initiating removal actions, were required to complete the time-consuming EIS process prescribed by the applicable NEPA regulations. Under these circumstances, compliance with NEPA

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41 EPA has consistently taken the position that CERCLA remedies are required to meet only the "substantive" requirements of other laws, not the procedures. See 40 C.F.R. § 300.5 (1991) (definitions of "applicable requirements" and "relevant and appropriate requirements"); 40 C.F.R. § 300.400(g) (ARAR compliance); see also 55 Fed.Reg. at 8756-57 (March 8, 1990) (revised NCP preamble). See H.R. Conf. Rep. No. 962, 99th Cong. 2d Sess. 246 (1986 ("[n]ew section 121(d) establishes the substantive standards that remedial actions must meet") (emphasis added).

42 Section 113(a) of CERCLA provides that any challenge to the definition of ARARs as being limited to substantive requirements may be brought only in the D.C. Circuit. See 42 U.S.C. § 9613(a) and discussion, supra.

would create an irreconcilable conflict in statutory authority, so as to relieve the agency of any duty to prepare an EIS.

Thus, even if the Court were to consider the NEPA question, both NEPA and CERCLA clearly preclude the application of NEPA requirements to the CERCLA cleanup action at issue here.

CONCLUSION

For the foregoing reasons, all claims against EPA should be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

Acting Assistant Attorney General
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